

CHAN SANG & ANOR.

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v.

GOLDEN CENTURY DEVELOPMENT SDN. BHD. & ANOR.
AND EIGHT OTHER CASES

HIGH COURT MALAYA, JOHOR BAHRU
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. 354/1980]
22 OCTOBER 1994

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PRACTICE & PROCEDURE: *Committal proceedings against director of 2nd defendant - Failure to transfer property to plaintiffs within stipulated period - Leave to issue committal proceedings granted by Senior Assistant Registrar in chambers - Whether improper - Whether Senior Assistant Registrar had jurisdiction to grant the order - Consideration of O.32 r.9, O.52 rr.1(3),(4), 2 & 3(1) RHC 1980.*

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STATUTORY INTERPRETATION: *Order 1 r.4(2) RHC 1980 - "Court".*

On 18 January 1987, similar orders were made in respect of seven of nine civil suits in which the defendants/respondents were required to transfer certain property to the plaintiffs / applicants by executing and depositing the relevant documents into Court within one month from the date of the said orders. Upon failure of the respondents to comply with the orders a notice of motion was filed on 14 October 1989 to commit a director of the 2nd respondent to prison for contempt.

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Counsel for the respondent submitted *inter alia* that leave to issue committal proceedings was improper as it should have been heard before a Judge in open Court instead of by the learned Senior Assistant Registrar (the Registrar) who had granted the order in chambers on 8 October 1989. The applicant's Counsel claimed that the application for leave was in compliance with O.52 of the Rules of the High Court 1980 (RHC).

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The primary issue before the Court was whether the Registrar had the jurisdiction to grant the order for leave.

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Held:

A proper reading of O.52 of the RHC in its entirety and not each rule separately would suggest that the word "Court" does not include the Registrar, and as for the definition of "Court" in O.1 r.4(2), the relevant order must be construed as being one of the situations "where the context otherwise requires". On these considerations, the application for leave under the order had been wrongly made as it should have been to a Judge in open Court when the High Court is in session or to a Judge in chambers as what had happened in this case. The application for leave is the root of the committal proceedings and any non-compliance of the procedure prescribed cannot merely amount to an irregularity but it would actually nullify the proceedings. Accordingly, no proper committal proceedings are before this Court.

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[Application dismissed with costs]

Cases referred to:

Datuk Hong Kim Sui v. Tiu Shi Kian & Anor. [1987] 1 MLJ 345. (cit)
William Jacks & Co. (M) Sdn. Bhd. v. Chemquip (M) Sdn. Bhd. & Anor. [1994] 3 MLJ 40. (cit)
MBf Holdings Bhd. & Anor. v. Houngh Hai Kong & Ors. [1993] 2 MLJ 516. (cit)
Danchevsky v. Danchevsky [1974] 3 ALL ER 934. (cit)

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- a* *Harkness v. Beil's Asbestos And Engineering Ltd.* [1966] 3 ALL ER 843. (*dist*)
Tan Chew Wah v. Teor Kang Swee [1934] SSLR Vol. III 139. (*dist*)
E.G. Tan & Co. (Pte) (in liquidation) v. Tan Chong San [1993] 1 MLJ 256. (*dist*)
United Malayan Banking Corp. Bhd. v. Chuah Gim Suan @ Chai Chong Chin [1994] MMD 308.
(*cit*)
- b* For the applicants - *Tan Jin Wah; M/s. Tan & Tan*
For the respondent - *P. Suppiah; M/s. J. Singh & Co.*

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

- c* It is relevant to start off by stating that I had been assigned to come from Kuala Lumpur to do this case by the Chief Judge of the High Court Malaya as all the learned Judges stationed at the High Court at Johore Bahru had disqualified themselves from hearing the matter.

Similar orders had been made on the 18 January 1987 for the first seven of the nine cases and it is necessary for our purpose to reproduce only the order at prayer (b) for the first case which is:

- d* (b) That Jet Age Construction Sdn. Bhd. do execute a valid and registrable memorandum of transfer in favour of the Plaintiffs in respect of the qualified titled No. HS(D) 19243 for Lot No. TLO 10397 and deposit the same together with the issue document of title in respect of the land aforesaid in this Court within one month from the date hereof and in the event of default the Senior Assistant Registrar of this Court shall be empowered to execute all the relevant documents and perform all the necessary acts on behalf of the First and/or the Second Defendant to give effect to this Order.

- e* What is more relevant, of course, is the indorsement at the end of the order which reads:

If you, the within-named Golden Century Development Sdn. Bhd. and Jet Age Construction Sdn. Bhd. neglect to obey this Order by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same.

- f* If Golden Century Development Sdn. Bhd. and Jet Age Construction Sdn. Bhd. neglect to obey this Order by the time therein limited, you Jaginder Singh a director of the said Golden Century Development Sdn. Bhd. and Jet Age Construction Sdn. Bhd. will be liable to process of execution for the purpose of compelling the said Golden Century Development Sdn. Bhd. and Jet Age Construction Sdn. Bhd. to obey the same.

Consequently, on the 14 October 1989, the following notice of motion was filed:

- g* **Notice of Motion**

Take notice that pursuant to the leave of this Court given on the 8 October 1989 the Court will be moved on Rabu (Wednesday), the 1 November 1989 at 9.00 a.m. or so soon thereafter as Counsel can be heard, by Counsel for the abovenamed applicants for an order:

- h* 1. That Jaginder Singh of No. 41 Jalan Waspada, Johore Bahru, as a director of Jet Age Construction Sdn. Bhd., do stand committed to Johore Bahru Prison for his contempt in not paying obedience to the order of Court made on the 18 January 1987 ordering the said defendant Jet Age Construction Sdn. Bhd. to do the following acts within one (1) month from the date of the order:

- (1) xxxx
- i* (2) In connection with the aforesaid Johore Bahru High Court Civil Suit No. 354 of 1980, do execute a valid and registrable memorandum of transfer in favour of Chan Sang and Chan Yoke Fong in respect of qualified title No. HS(D) 19243 for Lot No. TLO 10397 and deposit the same together with the issue document of title in respect of the land aforesaid in the High Court, Johore Bahru.

(3) xxxx

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(4) xxxx

(5) xxxx

(6) xxxx

(7) xxxx

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2. That the said defendant Jet Age Construction Sdn. Bhd. and/or Jaginder Singh do pay the abovenamed applicants their costs of and incidental to this Application and also of the issuing and execution of such Order of Committal to be made hereon.

3. That the costs of and occasioned by this motion be paid by the said defendant Jet Age Construction Sdn. Bhd. and/or Jaginder Singh and also of the issuing and execution of any such Order of Committal to be made hereon.

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And further take notice that the applicants intend to read and issue in support of this Application the statement and affidavit of Tan Hock Kim filed herein on the 21 March 1987, and the several exhibits thereunto respectively annexed, in support of the Application for leave under O. 2, r. 2 of the Rules of High Court 1980, copies of which statement, affidavit and exhibits, are intended to be served together with this Notice of Motion.

Dated this 14 October 1989.

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Senior Assistant Registrar,
High Court, Malaya,
Johore Bahru.

The acts described in the other subparagraphs of paragraph 1 are similar to the one reproduced in subparagraph (2) thereof.

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At the outset, learned Counsel for the plaintiffs (hereinafter “the applicants”) had applied to delete the name of Jaginder Singh (hereinafter “the respondent”) in prayer 2 and to withdraw prayer 3 as it was repetitive. It would be more of an understatement to say that I was also quite shocked that the matter had not been heard for five years despite the fact that learned Counsel for the applicants had explained that it was partly due to the appeal against the original order pending in the then Supreme Court which had been dismissed only on the 27 April 1989. That, to my mind, could only result in the delay in filing the notice of motion but certainly could not have delayed the hearing of the matter.

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He had also submitted that O. 52 (hereinafter “the relevant Order”) of the Rules of the High Court 1980 (hereinafter “the Rules”) had been complied with. The application for leave to commit the respondent for contempt had been filed by way of summons in chambers as early as 1 April 1987 but it was granted by the learned Senior Assistant Registrar (hereinafter “the Registrar”) only on 8 October 1989 and the notice of motion filed on 14 October 1989 had been served on the respondent on 18 October 1989. It is also quite clear here that there had been a delay of about two and a half years in the hearing of the application for leave itself, but this of course must be due to the pending appeal in the then Supreme Court as regards the original order dated 18 January 1987.

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While that appeal was pending, there was an order for stay granted on 9 September 1987. The appeal was dismissed on 27 April 1989 and as stated by learned Counsel for the applicants, the respondent was to comply with the original order by 18 February 1987 and following the stay pending appeal obtained after that date, there had been no compliance with the order even after the dismissal of the appeal on 27 April 1989 until the 5 December 1989 when only four of the seven documents of title were handed over by the respondent.

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- a* Learned Counsel had further gone on to state that the alternative limb in the order which provided for the Registrar to execute all the relevant documents in the event of default by the defendants did not relieve the defendants from the obligation as the Court was not in a position to transfer all the documents to itself. The defendants had also presented a winding-up petition against itself on 14 November 1989 with the intention of rendering the transfers null and void. He reiterated that the authorities are clear that directors must ensure compliance with Court orders against companies and if a director was found guilty of contempt, he was subject to committal proceedings. In this case, there had only been partial compliance of the order some two years and ten months later and he had accordingly asked for the order in terms but had left the punishment to the Court.
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- c* Learned Counsel for the respondent had enunciated that there was in fact the alternative in the order for the Registrar to execute the transfers if the company failed to do so and that it was not proper to punish just the respondent when there were two other directors as well especially when a single director could not execute the transfers on behalf of the company. He argued that the authorities cited were not relevant as they concerned injunctions and the orders in those cases were to prevent damages in the event the injunctions had not been complied with. In any case, he added, the company had subsequently complied with the order. He had explained that the delay was caused by the fact that the title deeds were actually with the second purchasers' solicitors even before the relevant Court order had been granted.
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- e* The next issue raised by learned Counsel for the respondent was the fact that leave to issue committal proceedings has been done *ex parte* before the Registrar in chambers. He was of the view that the procedure was not correct as the application for leave should have been before the Judge in open Court. At that stage, learned Counsel for the applicants had replied that everything had been done in compliance with the relevant Order. However, during the adjournment pending the decision, learned Counsel for the respondent had sent in a written submission on 12 September 1994 to further elaborate on this point and accordingly learned Counsel for the applicants had also sent their reply on 23 September 1994.

- f* To my mind, this is the crux of the matter and has to be determined first before any necessity arises as to the deliberation of the other points raised. It is pertinent to point out that I had, in the course of going through the file before the hearing began, happened to enquire from the very same Registrar as to who had granted the leave and he had told me that he had done so. It had occurred to me then that that was quite unusual as for all the contempt matters that I had heard previously, it had always been that leave was granted by me as Judge in open court. This issue, in my view, raises a very important point of jurisdiction as it has now been argued that a Registrar of the High Court cannot grant leave under the relevant order mindful of the fact that the Registrar in question had actually done so in chambers on 8 October 1989.
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- h* The problem becomes more pronounced because in the relevant order certain functions are not exercisable by the Registrar but only by a Judge of the High Court as in rr. 1(3) and (4) which clearly state that an order of committal may only be made by a Judge of the High Court although in r. 2 the words "a Judge of" is missing for a similar provision. But it is r. 2 of that order which has given rise to this issue and it is appropriate to reproduce it in full at this stage:

- i* 2.(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

- (2) An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in Chambers, and must be supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

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For the meaning of the word “Court” it is necessary to read O. 1 r. 4(2) of the Rules which state:

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- (2) In these rules, unless the context otherwise requires, “Court” means the High Court or any one or more Judges thereof, whether sitting in Court or in Chambers, or the Registrar; but the foregoing provision shall not be taken as affecting any provision of these rules and, in particular, O. 32, r. 9, by virtue of which the authority and jurisdiction of the Registrar is defined and regulated.

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It may also be convenient at this juncture because of it being referred to in the previous paragraph to set out exactly what O. 32 r. 9 says about the jurisdiction of the Registrar and which is:

9. The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a Judge in Chambers except such business, authority and jurisdiction as the Chief Justice may from time to time direct to be transacted or exercised by a Judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a Judge in person.

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It is also proper to point out that from the reading of the above rule, it is amply clear that the Registrar can only do what a Judge can do in chambers but not what a Judge can do in open court, except when directed otherwise by the Chief Justice.

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If we look at “No application to a Court for an order of committal against any person may be made unless leave” in r. 2(1) of the relevant order, the word “Court” must surely mean “a Judge of the High Court” as the preceding rule 1 has respectively made it clear that an order of committal can only be made by a Judge of the High Court. As to whether it is to the Judge of the High Court in chambers or in open court, the answer is provided in r. 3(1) of the relevant order which says that “When leave has been granted under r. 2 to apply for an order of committal, the application for the order must be made by motion to the Court....”. The word “motion” clearly denotes that it must be made to a Judge of the High Court in open court and not to a Judge in chambers.

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The problematical part is of course r. 2(2) of the order which states that “An application for such leave must be made *ex parte* to the Court, except in vacation when it may be made to a Judge in Chambers, ...”. Does the word “Court” there include the Registrar as envisaged by O. 1 r. 4(2) of the Rules? I would think not as it would mean that it is made to a Judge in chambers only during court vacations as ordinarily at other times it may be made to the Registrar when the Court is in session. And why cannot you apply to the Registrar when the Court is in vacation? In fact, it would be more logical to have it the other way round, that is, to apply to a Judge when the Court is in session and to the Registrar when the Court is in vacation.

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This is best explained, however, by the fact that this rule and the relevant Order were taken from the Rules of the Supreme Court in England except that there the words “Divisional Court” appear instead of “Court” for the relevant order. This would make more sense as it would mean that while the Court is in session, the application must be made to the Divisional Court, which is two Judges of the High Court sitting together to hear appeals or case

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a stated on points of law from inferior courts, and to a Judge in chambers when it is in vacation. I can only surmise that there has been a drafting slip-up somewhere in copying the English Rules which has led to our present predicament. For local purposes, therefore, the application for leave should be made *ex parte* to a Judge of the High Court in open court while it is in session and to a Judge in chambers when it is in vacation.

b Having decided that, it is proper to make reference to r. 3(1) of the Order where "... unless the Court or Judge granting leave ..." must surely only be consequential to r. 2(2) and does not actually indicate that "Court" is to include the Registrar as well. A proper reading of the relevant Order in its entirety and not each rule separately would suggest that the word "Court" does not include the Registrar, and as for the definition of "Court" in O. 1 r. 4(2), the relevant Order must be construed as being one of the situations "where the context otherwise requires". It is also relevant to state that on 8 October 1989 the High Court was not in vacation as seen from P.U.(B) 17 of the Government Gazette published on 12 January 1989.

c On these considerations, I can only conclude that the application for leave under the order had been wrongly made as it should have been to a Judge in open court when the High Court is in session or to a Judge in chambers if it is in vacation and not to the Registrar in chambers as what has happened in this case. To my mind, the application for leave is the root of the committal proceedings and any non-compliance of the procedure prescribed cannot merely amount to an irregularity but it would actually nullify the proceedings.

d I have been made aware of *Harkness v. Bell's Asbestos And Engineering Ltd.* [1966] 3 ALL ER 843 where the plaintiff had applied by virtue of s. 1 of the Limitation Act 1963 for leave that s. 2(1) of the Limitation Act 1939 should not afford a defence to his proposed action for damages for personal injuries which application was made by affidavit to a district registrar who accordingly granted it. Order 128 r. 1(1) of the Rules of the Supreme Court, however, required that the jurisdiction should be exercised by a Judge in chambers in person and therefore the district registrar had no jurisdiction to give leave. On the application of the defendants to set aside the order, the Judge took the view that the order was a nullity and made no order. On appeal from the refusal of a subsequent application by the plaintiff that the order of the district registrar should be rectified and treated as valid, it was held by the Court of Appeal that the original application to the district registrar was a "proceeding" within O. 2 r. 1 of the Rules of the Supreme Court with the consequence that the failure to comply with O. 128 r. 1(1) did not render the application a nullity but amounted only to an irregularity and the defect in the district registrar's order could be amended. Although this authority had been cited by learned Counsel for the applicants, it actually works in favour of the respondent because in our present circumstances, the leave obtained from the Registrar in chambers cannot be held to be a "proceeding" under O. 2 r. 1(1) and it certainly cannot amount to an irregularity but a nullity as it should not have taken place at all irrespective of whether the High Court was in session or in vacation on 8 October 1989. To put it simply, the Registrar had no jurisdiction to deal with the matter. Since it is not an irregularity, the case of *Tan Chew Wah v. Teo Kang Swee* [1934] SSLR Vol. III 139 and my previous ruling in *E.G. Tan & Co. (Pte) (in liquidation) v. Tan Chong San* [1993] 1 MLJ 256 are not applicable here. Similarly, the learned Counsel for the applicants' argument that the respondent had taken fresh steps after knowing of the irregularity, implying that they had waived that point, has no merit in these circumstances.

e Accordingly, I find that no proper committal proceedings are before this Court and would order that this notice of motion be dismissed with costs.

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